IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, ET AL., *Appellants,*

v.

MICHAEL M. DOYLE, ET AL., *Appellees.*

On Appeal from the District of Columbia Court of Appeals

BRIEF OF APPELLEE ST. MATTHEWS CATHEDRAL

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JURISDICTION

THE COURT DOES NOT HAVE APPEAL JURISDICTION AS THE LAW INVOLVED IS NOT A "STATUTE OF THE UNITED STATES"

Jurisdiction over this appeal was asserted in Appellants' Jurisdictional Statement (filed January 31, 1977) as based on 28 U.S.C. § 1257(1), on the grounds that D.C. Code § 18-302 is a "statute of the United States" and the decision below is against its validity. On March 21, 1977 this Court ordered that "Further

consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." Appellants' Brief, notwithstanding Rule 16(6) of the Rules of this Court, has not addressed the question of jurisdiction. For the reasons submitted in Argument I, *infra,* this Appellee submits that the Court is without jurisdiction of the appeal because D.C. Code § 18-302 is not "a statute of the United States" within the meaning of 28 U.S.C. § 1257(1).

THE COURT SHOULD NOT EXERCISE CERTIORARI JURISDICTION

This Court should not treat the Jurisdictional Statement as a Petition for a Writ of Certiorari under 28 U.S.C. § 1257(3), cf., *Palmore* v. *United States,* 414 U.S. 389, 396, 93 S.Ct. 1670, 1676 (1973), because this case presents neither a substantial federal question nor an issue that needs further elucidation as precedent. As will be shown in the Counterstatement of Facts and Argument, D.C. Code § 18-302 (the so-called D.C. "Mortmain statute") is unique in the United States in that it provides a proscription against only religious testamentary gifts. The District of Columbia, which stands to gain tax revenue by the continued validity of the statute, did not join in the appeal from the Superior Court and the United States has never entered the case, although given notice under Rule 47 of the Rules of the District of Columbia Court of Appeals, analogous to 28 U.S.C. § 2403. Thus, neither governmental entity apparently considers the issues substantial.[1]

[1] On February 28, 1972, the United States District Court for the District of Columbia, the Court then having probate jurisdiction in the District of Columbia, held D.C. Code § 18-302 unconstitutional as violative of the First Amendment. *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L.Rptr. 453 (Adm. No. 2507-70, D.D.C. 1972). As noted by the trial court below

> "Subsequent thereto, and so long as jurisdiction over probate matters remained vested in the United States District Court, all estates presenting issues under 18 D.C. Code 302 were administered without reference to that statute. No challenge was raised by the District of Columbia Government to the application of the *Small* ruling thereafter, so long as probate jurisdiction remained in the District Court. However, upon the transfer of probate jurisdiction to this Court, the District of Columbia seeks a redetermination of said issue by refusing to issue an Inheritance Tax Certificate required by Rule 14(e) of the Probate Rules of this Court unless the Executor amends his final account to delete the payment of legacies to the Little Sisters of the Poor, Calvary Baptist Church, and St. Matthews Cathedral. Whereupon, the Executor filed this complaint for instructions." (Jurisdiction Statement, Appendix B, 5b).

By its failure to join in an appeal of this case, the Government of the District of Columbia has now twice acquiesced in a decision of a District of Columbia Court invalidating the provisions of D.C. Code § 18-302.

STATEMENT UNDER RULE 33(2)(b)

In this proceeding the constitutionality of D.C. Code § 18-302 is drawn in question and 28 U.S.C. § 2403 may be applicable as the United States is not a party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Article I, Section 8, Clause 17
Article III, Section 1
Amendment 1
Amendment 5

28 U.S.C. § 1257(1)

D.C. Code § 18-302

The texts of the foregoing are contained in the Appendix to the Brief.

QUESTIONS PRESENTED FOR REVIEW

1

Whether an act of Congress applicable only to the District of Columbia, which has been invalidated by a District of Columbia Court, is a "statute of the United States" for the purpose of giving this Court appeal jurisdiction in cases where is drawn in question the validity of a statute of the United States, when the Congress, mindful of the case load of this Court, has otherwise in a series of acts clearly indicated that an act of only local applicability is not to be treated as a "statute of the United States."

2

Whether the classification created by a statute which voids testamentary gifts only to religious organizations but not to charities (even those owned and operated by religious organizations), even when the testator is not survived by any heirs at law and next of kin, bears any rational relation to the statutory purpose of protecting the testator from undue religious influence and his family from disinheritance.

3

Whether there is any compelling governmental need for a statute which voids only religious testamentary gifts, when any other bequest or devise may be avoided only upon a showing of demonstrable undue influence.

4

Whether a statute, adopted for the purpose of preventing a testator from being subjected to undue religious influence in the making of a will to the derogation of family, which requires for the validity of only

testamentary gifts to religious organizations that the testator survive the execution of the will in which such gifts are made by 30 days, infringes the "free exercise" rights of a religion to solicit the testator for a bequest or devise and the testator to make one.

COUNTERSTATEMENT OF THE CASE

The Testatrix, Sallye Lipscomb French, a member of the Baptist Church, died on November 2, 1972, after having executed a Last Will and Testament on October 13, 1972, and a Codicil (which is not involved in this litigation) on October 26, 1972 (Appendix, hereinafter A., 11, 14). By this Will she left one-third of her residuary estate (which did not contain real estate) to the Appellee, the Calvary Baptist Church, and one-third to this Appellee, St. Matthews Cathedral, to which under Canon Law the ordinary, the Roman Catholic Archbishop of Washington, takes title (A. 11).

The Testatrix survived her husband, Dr. Bernard French, a member of the Catholic Church, by twelve years (A. 14). After his death she executed two wills previous to the one in question, namely one in 1960 and one in 1963 respectively, by which she made several religious bequests to both the Baptists and the Catholics (A. 12, 13). It was stipulated by all parties that none knew ". . . of any attempts by members of either the Baptist Church or the Catholic Church to influence, cajole or otherwise persuade the Testatrix to make any bequests to them or their organizations" (A. 14).

Michael M. Doyle, Executor of the Estate of Sallye Lipscomb French, commenced the action below by filing a Complaint For Instructions (A. 3) when the

Finance Office of the Government of the District of Columbia refused to issue a Tax Certificate showing that the District of Columbia inheritance tax liability had been discharged,[2] because that office asserted the distribution of two-thirds of the residue of the estate to St. Matthews Cathedral and the Calvary Baptist Church pursuant to the terms of the Will would be in violation of the District of Columbia so-called "Mortmain statute" (D.C. Code § 18-302), inasmuch as the Testatrix had died on November 2, 1972, within thirty days of executing the Will by which the legacies voided by this Statute were made.[3]

In his Complaint For Instructions, the Executor asserted that these two bequests were valid and that the Tax Certificate should issue because the United States District Court for the District of Columbia had previously found the District of Columbia Mortmain statute unconstitutional as a violation of the First Amendment to the United States Constitution, in the case of *In Re: Small,* 100 Daily Wash.L.Rptr. 453 (Admin. No. 2507-70, D.D.C. Feb. 7, 1972) (A. 5-9). The District of Columbia, which had neither intervened nor been named a party in the *Small* case,

[2] Under Rule 14(e) SCR-PD of the Superior Court Rules of the Probate Division, a Tax Certificate must be filed with the Probate Division of the Superior Court before an Executor's Final Account showing distribution can be approved.

[3] The Complaint also alleged the validity of a separate bequest to the Little Sisters of the Poor. That bequest was found not to be within the proscription of D.C. Code § 18-302 upon Motion by Summary Judgment by reason of D.C. case law declaring the legatee not to be a sectarian institution within the meaning of the Statute. No appeal was noted from that decision of December 19, 1974 (Jurisdictional Statement, Appendix B, 2b, Appendix A, 4a, 5a).

was named as a substitute Defendant as were Appellants John W. Key (decedent's brother) and eleven nieces and nephews of decedent (being the only heirs at law and next of kin), as well as the two religious residuary legatees, Appellees St. Matthews Cathedral and the Calvary Baptist Church (A. 9).[4]

William W. Baum, Roman Catholic Archbishop of Washington, a corporation sole (A. 11), answered the Complaint on behalf of St. Matthews Cathedral annd asserted the unconstitutionality of the District of Columbia Mortmain statute. The Calvary Baptist Church also answered and made that assertion.

John W. Key and the other collateral heirs at law and next of kin answered the Complaint and asserted the validity of the District of Columbia Mortmain statute.

After a hearing in January 1975, the Probate Division of the Court issued a ten-page opinion and Order on February 13, 1975, by which it found that there was neither a rational basis for, nor a compelling state interest in, the arbitrary classification of bequests made by the District of Columbia Mortmain statute and hence, the statute (D.C. Code § 18-302) violates the Fifth Amendment. It also held that the statute affected a fundamental interest protected by the First Amendment and unconstitutionally infringed the free exercise of religion protected thereby (Jurisdictional Statement, Appendix B). The Court also ordered that its ruling apply to all probate cases

[4] The remaining one-third of the residuary estate was bequeathed to the John Hopkins University, and was not subject to D.C. Code § 18-302 (Jurisdictional Statement, Appendix B, 3b).

administered in the Superior Court of the District of Columbia. From this Order the heirs at law and next of kin appealed, but the District of Columbia, however, did not (A. 4).

The Appellees in the District of Columbia Court of Appeals gave appropriate notice under Rule 47 of the Rules of that Court that Appellees intended to draw into question the constitutionality of D.C. Code § 18-302, but neither the United States nor the District of Columbia appeared (A. 1, 2).

The District of Columbia Court of Appeals affirmed, but did not reach the First Amendment question, as its decision was based on the grounds that the statute was invalid as the classification established between gifts to religious institutions and gifts to charitable organizations (even those owned and operated by religious institutions) bears no rational relationship to the purpose of the legislation, *i.e.*, to preclude deathbed gifts to religious organizations by persons who might be unduly influenced by religious considerations, and hence, the statute denies religious legatees equal protection and due process of law under the due process clause of the Fifth Amendment. While agreeing with the decision of the Court, the then Chief Judge Reilly, in a concurring opinion, felt that the Court should have invalidated the statute on First Amendment grounds, as the objective of the statute, precisely forbidden by the "free exercise" clause, is to prevent the clergy from exercising a constitutional right to solicit contributions by representations, and that such objective is premised upon the assumption that such representations are false and hence Congress can enact safeguards against their effect.

SUMMARY OF ARGUMENT

This case presents two basic issues for consideration in this Court.

The first issue is whether this Court possesses appeal jurisdiction under 28 U.S.C. § 1257(1) when the District of Columbia Court of Appeals has invalidated on constitutional grounds a provision of the D.C. Code of local applicability. Both the statutes and cases indicate that there is no such appeal jurisdiction in this Court, and, as a corollary, Appellee submits that the case should not be reviewed under certiorari jurisdiction as the D.C. statute in question (the so-called "Mortmain statute") is unique in that it is dissimilar from the Mortmain statutes in other states, as well as the traditional English Mortmain statute because it restricts only religious bequests and devises.

The second issue, which need be addressed only if this Court should review the case by appeal or certiorari, is whether the Court below erred in invalidating said Mortmain statute. As will be developed in the Brief, Appellee submits that the statute is invalid on the basis of either the Fifth or First Amendments to the Constitution, and that the decision below applied the correct tests as prescribed by this Court in holding the statute repugnant to the Constitution.

THE ARGUMENT

I

THE DISTRICT OF COLUMBIA MORTMAIN LAW D.C. CODE § 18-302 IS NOT A "STATUTE OF THE UNITED STATES" WITHIN THE MEANING OF 28 U.S.C. § 1257(1) CONFERRING APPEAL JURISDICTION UPON THIS COURT WHERE THE VALIDITY OF A STATUTE OF THE UNITED STATES HAS BEEN DRAWN IN QUESTION

Appellants assert that D.C. Code § 18-302 is a "statute of the United States" within the meaning of 28 U.S.C. § 1257(1). Appellee's position is simply that while any Act of Congress is a statute of the United States (under Article III, Section 2 of the Constitution), Congress does not intend laws applicable only in the District of Columbia to be "statutes of the United States" for purposes of the Court's appeal jurisdiction under 28 U.S.C. § 1257(1).

A

THE COURT HAS NOT PREVIOUSLY HELD THAT A PROVISION OF THE D.C. CODE IS A "STATUTE OF THE UNITED STATES" WITHIN THE MEANING OF 28 U.S.C. § 1257(1)

Until the District of Columbia Court Reform and Criminal Procedure Act of 1970 (84 Stat. 473 [1970]) made the District of Columbia Court of Appeals an Article I court (84 Stat. at 475), the highest court in the District of Columbia (84 Stat. 475, D.C. Code § 11-102) and, for the purposes of appeal jurisdiction of this Court under 28 U.S.C. § 1257, the "highest court of a state" [84 Stat. 590, 28 U.S.C. § 1257], Section 1257 had never been applicable to either an Article I or Article III court in the District of Columbia. Theretofore, appeals from the District of Columbia Court of Appeals lay to the United States Court of Appeals for

the District of Columbia Circuit, which this Court could review under 28 U.S.C. § 1254. There has not previously been an occasion for this Court to consider its appeal jurisdiction under 28 U.S.C. § 1257(1) in an appeal from the District of Columbia. Thus, there are few pertinent cases on the question of what constitutes a "statute of the United States" under 28 U.S.C. § 1257(1).

The propriety of appellate review by this Court of final state court decisions nullifying federal law is implicit in the constitutional provision for the supremacy of federal law (Article VI, Clause 2), and the judicial power of the United States (Article III, Section 1) as articulated in *Martin* v. *Hunter's Lessee,* 1 Wheat 304, 4 L.Ed. 97 (1816) wherein the provisions of Section 25 of the Judiciary Act of 1789 (1 Stat. 85 [1789]), were upheld. In *Cohen* v. *Virginia,* 6 Wheat 262, 5 L.Ed. 257 (1821), that section, the forerunner in concept of 28 U.S.C. § 1257(1), was held to provide appellate review of a case where a Virginia court held the District of Columbia Organic Act could not authorize the territorial legislature of the District of Columbia to pass a lottery act which would immunize its citizens from prosecution under Virginia gambling laws for selling lottery tickets in Virginia. There is, however, an arguable necessity for this Court's appeal jurisdiction of a state court's decision nullifying a federal law, because a state is not under the control of the Congress or the President and such nullification could not otherwise be corrected. No such necessity is presented for appellate review of decisions of the District of Columbia Court of Appeals, as it is an Article I court over which Congress has plenary power. Any needed review is always available pursuant to 28 U.S.C. § 1257(3) as

noted in *Swain* v. *Pressley,* —— U.S. ——, 97, S.Ct. 1224, 1235 (1977) (note 16).

B

PREVIOUS STATUTES PROVIDING THE APPEAL JURISDICTION OF THIS COURT FROM DISTRICT OF COLUMBIA COURT CASES ARE NOT DEFINITIVE AUTHORITY

1

Early Appeal Jurisdiction

The first court in the District of Columbia was the Circuit Court of the District of Columbia (2 Stat. 105 [1801]) from which this Court could review judgments in excess of $100 by appeal or writ of error (2 Stat. 106 [1801]). In 1816 the amount needed for appeal jurisdiction was raised to $1000 (3 Stat. 261 [1816]). In 1863 the Circuit Court of the District of Columbia was abolished and in its place was established the Supreme Court of the District of Columbia (12 Stat. 762 [1863]). This Court could review decisions of the general term of the Supreme Court by appeal or writ of error on the same basis as had theretofore existed for the Circuit Court of the District of Columbia (12 Stat. 764 [1863]). In 1885 the appeal jurisdiction was set at $5000 but for the first time federal question jurisdiction was added, the statute providing for appeal jurisdiction without regard to the sum in

> "... any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under The United States ...." 23 Stat. 443 (1885).

There was, however, no clear Congressional intent to limit this Court's appeal jurisdiction by this act. In

Baltimore & P.R.Co. v. *Hopkins,* 130 U.S. 210, 9 S.Ct. 503 (1889), an appeal case from the Supreme Court of the District of Columbia under this jurisdictional statute (23 Stat. 443 [1885]), the Court determined that there was no question raised as to the validity of a local Railway Act and thus did not reach the question as to whether such act was a "statute of the United States."

In 1893 a new Court of Appeals was established for the District of Columbia known as the Court of Appeals of the District of Columbia which succeeded to the appellate power of the general term of the Supreme Court of the District of Columbia whose appellate jurisdiction was abolished. 27 Stat. 434 (1893). This Court was given appeal jurisdiction over the Court of Appeals for the District of Columbia.

> "... without regard to the sum or value of the matter in dispute, wherein is involved the validity of ... a treaty or statute of or an authority exercised under the United States." 27 Stat. 436 (1893).

In the cases decided under these appeal statutes this Court infrequently commented upon its appeal jurisdiction.

In *Parsons* v. *District of Columbia,* 170 U.S. 45, 18 S.Ct. 521 (1898) in a writ of error case on review under the same jurisdictional statute as was involved in *Baltimore & P.P.Co.* v. *Hopkins, supra,* where the validity of an Act of Congress involving District of Columbia water main assessments was questioned the Court noted at p. 523 "... we think it plainly appears that the validity of statutes of the United States and of an authority exercised under the United States was

drawn into question. . . ." But in *Bauman* v. *Ross,* 167 U.S. 548, 17 S.Ct. 966 (1897), and *Wright* v. *Davidson,* 181 U.S. 371, 21 S.Ct. 616 (1901) there was no discussion of jurisdiction. In *Smoot* v. *Heyl,* 277 U.S. 518, 33 S.Ct. 336 (1913), however, the Court held it had appeal jurisdiction in a suit challenging building regulations as an authority exercised under the United States.

2

The First Attempt To Limit The Court's Appeal Jurisdiction From District Of Columbia Courts

In 1911, Congress adopted a new Judicial Code which abolished appeals from the District of Columbia in all cases involving a sum in excess of $5,000 (36 Stat. 1168) and substituted in § 250 (36 Stat. 1159) six classes of cases from which appeals might lie.

The applicable subparts of § 250 of the 1911 Code provided,

> "Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority."
>
> * * *
>
> "Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant." 36 Stat. 1159 (1911) (emphasis supplied).

In *American Security & Trust Co.* v. *Commissioners,* 224 U.S. 491, 32 S.Ct. 553 (1912), another condemnation case from the District of Columbia, the Court

found that the abolition of appeal jurisdiction for cases involving $5,000 or more in favor of appeals only involving a federal question very significant. Ignoring the other change of language from "any case" and "a statute of the United States" to "cases" and "any law of the United States" the Court held that it did not have appeal jurisdiction under § 250 (Sixth) of the code. The Court (Mr. Justice Holmes) stated on page 554:

> "Of course there is no doubt that the special act of Congress was, in one sense, a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: "Cases involving the constitutionality of any law of the United States." Parsons v. District of Columbia, 170 U.S. 45, 42 L.ed. 943, 18 Sup.Ct.Rep. 521. But it needs no authority to show that the same phrase may have different meanings in different connections. Some reasons for strict construction apply here. We are entirely convinced that Congress intended to effect a substantial relief to this court from indiscriminate appeals where a sum above $5,000 was involved, and to that end repealed the former act. See Carey v. Houston & T.C.R. Co. 150 U.S. 170, 179, 37 L.ed. 1041, 1043, 14 Sup.Ct.Rep. 63; Cochran v. Montgomery County, 199 U.S. 260, 272, 273, 50 L.ed. 182, 188, 26 Sup.Ct.Rep. 58, 4 Ann. Cas. 451. But all cases in the District arise under acts of Congress, and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants, the appellate jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result.

"A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is Church of the Holy Trinity v. United States, 143 U.S. 457, 36 L.ed. 227, 12 Sup. Ct.Rep. 511; we may refer further to Cochran v. Montgomery County, ubi supra. In the case at bar, if the words "construction of any law of the United States" are confined to the construction of laws having general application throughout the United States, the jurisdiction given to this court by § 250 is confined to what naturally and properly belongs to it."

In *McGowan* v. *Parish,* 228 U.S. 312, 33 S.Ct. 521 (1913) a case in which a question arose concerning the statute providing for the assignment of claims against the U.S., the Court (Mr. Chief Justice White) allowed the appeal under § 250(Sixth) noting at page 523, that,

"The duty in every case, therefore, arises where the right to appeal under the section is invoked, to ascertain whether the case substantially involves the construction of a law in the appealable sense. The fact that the court below, in the nature of things, must be constantly called upon to apply and enforce laws of the United States, local in character, admonishes us that when called upon to determine whether the right to an appeal exists, to be more than usually circumspect to see to it that the authority to review, conferred in one class of cases, be not permitted to embrace the other and large class of cases to which it does not extend."

In *Washington, A. & Mt. V. R. Co.* v. *Downey,* 236 U.S. 190, 35 S.Ct. 406 (1915), where an appeal was sought involving the Employer's Liability Cases under § 250(Sixth) the Court dismissed the appeal because

the subject statute had been held unconstitutional as a federal law and constitutional as an Article I (District of Columbia) law, thus, there was no question presented involving a law of the United States. The Court stated that the test of whether a law was local was to be determined by reference to which authority Congress relied upon for its passage, *i.e.,* Article I or Article III. The case of *Newman* v. *Frizzell,* 238 U.S. 537, 35 S.Ct. 881 (1915), presents a similar analysis. In this case the Court held at page 552/885 that certain sections of the D.C. Code are "to be treated as general laws of the United States, not as mere local laws of the District. Being a law of general operation, it can be reviewed on Writ of Error from this Court."

In *United Surety Co.* v. *American Fruit Product Co.,* 238 U.S. 140, 35 S.Ct. 828 (1915), a case involving a question under the D.C. Code which was sought to be appealed under § 250(Third), the Court, while remarking that the question of whether § 250(Third) applied to acts of Congress of local applicability had been left open in *American Security & Trust Co.* v. *Commissioners, supra,* dismissed the writ of error for want of jurisdiction under § 250(Third) stating that the alleged constitutional point was "a mere pretext put forward in order to open other questions that otherwise could not come here."

In *Heald* v. *District of Columbia,* 254 U.S. 20, 41 S.Ct. 42 (1920) the Court, noting that § 250(Third) was in fact broader in scope than § 250(Sixth) because § 250(Third) dealt with questions of the constitutionality of a law of the United States whereas § 250

(Sixth) dealt with questions of the construction of laws of the United States, held an appeal would lie in a case involving the constitutionality of a District of Columbia statute under § 250(Third). The Court relied upon *Parsons, supra,* and *Smoot, supra,* stating that § 250(Third) merely reenacted the jurisdictional statute previously found to embrace District of Columbia laws.

There is some *dicta* in *Marine Ry. & Coal Co., Inc.* v. *United States,* 257 U.S. 47, 42 S.Ct. 32 (1921) to the effect that the rule of decision in *American Security & Trust Co., supra,* should not apply to the circumstance of a statute defining the territorial extent of the District of Columbia in the Potomac River.

In *Corrigan* v. *Buckley,* 271 U.S. 323, 46 S.Ct. 521 (1926) an appeal was allowed and then dismissed for want of a substantial question under § 250(Third) where Federal Civil Rights Laws were involved. No discussion of local versus federal jurisdiction was raised.

In 1925, Congress abolished the separate provision for this Court's appeal jurisdiction from the District of Columbia contained in § 250 of the 1911 Judicial Code, 43 Stat. 941 (1925), and provided for review in like fashion as that available for review of decisions in the other Federal Circuit Courts of Appeals. 43 Stat. 938-9 (1925). After 1925, review in this Court of D.C. cases was put on the same basis as review of any decision from a U.S. Court of Appeals until the District of Columbia Court Reform and Criminal Procedure Act of 1970. 84 Stat. 473 (1970).

C

THE DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970 AND OTHER RECENT ACTS FURTHER RESTRICT THE TERM "STATUTE OF THE UNITED STATES"

By District of Columbia Court Reform Act and Criminal Procedure Act of 1970 (84 Stat. 473 [1970]) Congress transformed the District of Columbia Court System into two categories of Courts, Article I (Superior Court and District of Columbia Court of Appeals) and Article III (United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit) 84 Stat. 475. Cf. *O'Donoghue* v. *United States,* 289 U.S. 516, 53 S.Ct. 740 (1933) (District of Columbia Courts are Article III courts). The Aritcle I Courts were designed to function in a manner analogous to state courts. For example, the House Report No. 91-907 pp. 34-5 states,

> "In constituting the lower trial court as a purely local court, similar to a state court, it follows that appeals from the local court should be treated like those in the State systems, and that the channel of appeals should be directly to the United States Supreme Court. The reorganization recommended here makes the District of Columbia Court of Appeals the highest local court, with expanded powers in scope of review and rulemaking. Its decisions will be appealable directly to the United States Supreme Court. This provision removes the existing double level of appeals through the local circuit court. The structure of both appeals courts is changed: when the recommended transfers are accomplished, the local appeals court will have jurisdiction comparable with State courts; and the Federal appeals court will be comparable to other Federal appeals courts.

"The jurisdictional changes recommended by your Committee will result in a Federal-State court system in the District of Columbia analogous to court systems in the several States."

The concept is confirmed in the Senate report, p. 5,

"Likewise, the local appellate court, the District of Columbia Court of Appeals, is to be the highest court of this jurisdiction, the final authority, as to purely local matters and for purposes of appeal to the Supreme Court of the United States."

The reports, however, are not clear exactly what is meant by appeal beyond the face of 28 U.S.C. § 1257 (1). In the Hearings Before Commitee on the District of Columbia in the U.S. Senate on Crime In The National Capital, Part 1, March 11 & 12, 1969 at page 1159 appears this colloquy,

"The Chairman: on page 3, section 11-102 there is a provision relating to appeal:

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. For purposes of appeal to the Supreme Court and other purposes of law, it shall be deemed the highest court of the state.

"Now, my question to you is a question raised about that language. Is that sufficintly broad to allow the Supreme Court review by certiorari.

"Mr. Kleindienst. We believe so.

"The Chairman. As well as appeal pursuant to 28 U.S.C. 12750? [sic.] Because the language you know, leaves out certiorari. Certiorari is an important vehicle to reach the Supreme Court.

"Mr. Kleindienst. We believe the language covers certiorari but it would be easy to clarify."

In the District of Columbia Court Reform and Criminal Procedure Act of 1970 Congress clearly indicated that distinctions between "statutes of the United States" and "statutes of the District of Columbia" was of jurisdictional importance if the new District of Columbia courts under Article I were to be able to function as the local courts and the United States District Court for the District of Columbia was to be able to function as an exclusively Article III court. In Section 172c of the Act (84 Stat. 590), Congress added § 1363 to Title 28 of the United States Code, which provides,

"§ 1363 Construction of references to laws of the United States or Acts of Congress.

"For the purposes of this chapter, references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia."

This statutory definition is of significance since it was adopted after this Court's statement in *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969) (footnote 4 at page 625/1326), that *any* Act of Congress within the meaning of 28 U.S.C. § 2282 (Three Judge Court) includes a District of Columbia statute. The Court reasoned as follows,

"In Ex parte Cogdell, 342 U.S. 163, 72 S.Ct. 196, 96 L.Ed. 181 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U.S.C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly

> resolved. However, in Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. *See, e.g.,* Hobson v. Hansen, 265 F.Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "*any* Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia."

Congress has now taken steps to reduce the number of such cases by repealing 28 U.S.C. § 2282 entirely. 90 Stat. 1119 (1976).

In another area the Congress has further restricted appeals to this Court where appeal heretofore lay involving Acts of Congress which this Court has held included statutes of the District of Columbia. This Court held in *United States* v. *Vuitch,* 402 U.S. 62, 91 S.Ct. 1294 (1971), that the words "statute upon which the indictment is founded" in 18 U.S.C. § 3731 applies to a District of Columbia abortion law because the Criminal Appeals Act (18 U.S.C. § 3731) contains no language that purports to limit or qualify the term "statute." The Congress, however, had redirected such appeals to the United States Court of Appeals before the date of decision.

Congress also deleted the words "statute upon which the indictment is founded" in its amendment of 18 U.S.C. § 3731. In the conference report No. 91-1768 it is noted that the Senate Bill had provided that "Government appeals were required to be taken to a Court of Appeals unless the decision was based at least in part

on a determination of the invalidity of an Act of Congress. . . ." 1970 U.S. Code Cong. & Adm. News 5848. The report further stated, "Although the conference substitute does not provide for direct appeal to the Supreme Court, it is recognized that under Section 1254 of Title 28, United States Code, cases in the Courts of Appeal may be reviewed by the Supreme Court directly." *supra,* p. 5849. As a result, the Court stated "the end of our problems with this Act is finally in sight." *United States* v. *Weller,* 401 U.S. 254, 255, 91 S.Ct. 602, 604 (1971).

Apparently unconvinced by the cases, although citing none and citing no significant legislative history, one writer has suggested that the words "statute of the United States" in 28 U.S.C. § 1257(1) nevertheless include provisions in the District of Columbia Code, *see* 59 Geo. L. J. 492-3. It is the position of Appellee that the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, is of significance in interpreting Congressional intent as to the meaning of "statute of the United States." That the District of Columbia Code is not a state statute, *Palmore* v. *United States,* 411 U.S. 389, 93 S.Ct. 1670 (1973), does not mean that it is a statute of the United States. We duly note that the Court has admonished,

> "Jurisdictional statutes are to be construed "with precision and the fidelity to the terms by which Congress has expressed its wishes . . . and we are particularly prone to accord "strict construction of statutes authorizing appeals" to this Court." *Palmore, supra* p. 396/1675 (citations omitted).

It is incumbent upon Appellants to demonstrate this Court's jurisdiction in this appeal and Appellants have not even addressed the question, much less made a

showing. We think Congress has made it clear that a law of the District of Columbia is to be treated as something less than a statute of the United States. Were this Court to assume jurisdiction over this appeal it would be taking a step backward; toward the position it shunned in *American Security & Trust, supra.* In that case the Court reasoned that a construction of a jurisdictional statute, passed to reduce the number of appeals, which would have the effect of increasing the number of appeals, was unreasonable and unintended. The same rationale applies to this case. Now that 28 U.S.C. § 2282 has been repealed, if this case were to have arisen from the Article III courts in the District of Columbia only certiorari would be available to this Court under 28 U.S.C. § 1254. Inasmuch as the Congress itself distinguishes between statutes of the United States and those of the District of Columbia by its separate publication of the U.S. Code and D.C. Code, 1 U.S.C. § 201 *et seq.,* it would be unreasonable to think that Congress contemplated when it attempted to transform the District of Columbia Court of Appeals into the highest court of a state, that appeal jurisdiction from its decisions would encompass a larger number of cases than those from an actual state court.

But this would be just the result if the Court has appeal jurisdiction in this case. When a state court holds a state statute unconstitutional there is no appeal to this Court. Surely Congress did not intend in creating the District of Columbia Court of Appeals to allow appeal jurisdiction to this Court when the District of Columbia Court of Appeals holds a provision of the District of Columbia Code unconstitutional. To do so would be to expand the appeal jurisdiction under 28 U.S.C. § 1257(1) rather than to reduce it. Thus, we

think Congress has chosen to limit the appellate jurisdiction of this Court to cases involving the validity of statutes of the United States only of general application and not to those of purely local applicability. The crucial distinction between these two types of statutes was recognized by Congress in publishing its own statutes, the District of Columbia Court Reform and Criminal Procedure Act of 1970, and in its continuing effort to lessen the case load of this Court.

Under these circumstances Appellee submits that the Court does not possess appeal jurisdiction and should therefore dismiss the appeal.

II

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE IS UNIQUE BECAUSE IT DISCRIMINATES ONLY AGAINST BEQUESTS AND DEVISES TO RELIGIOUS ORGANIZATIONS FOR RELIGIOUS PURPOSES

A

THE CONSTRUCTION OF THE STATUTE BY DISTRICT OF COLUMBIA COURTS

The District of Columbia Mortmain statute is unique[5] within the United States as a restriction on testamentary alienation of property by voiding only religious devises and bequests if made in a will or codicil executed within thirty days of death. The statute provided as follows:

> "A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious

[5] 54 N.C.L.Rev. 431 note 71 at 437 (1976); *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L. Rptr. 453 (Adm. No. 2507-70 D.D.C. 1972).

sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator." Sept. 14, 1965, Pub.L. 89-183, § 1, 79 Stat. 688, D.C. Code § 18-302 (1973 ed.).

As seen by the opinion below (Jurisdictional Statement, Appendix A), the District of Columbia courts, with the concurrence of this Court, have construed the Mortmain statute so as to invalidate those bequests to religious organizations only when not used for charitable purposes, *i.e.,* non-sectarian bequests are valid, even if to a religious organization, *see Colbert* v. *Speer,* 24 App.D.C. 187 (1904), *aff'd,* 200 U.S. 130, 26 S.Ct. 201 (1906) (Georgetown University, St. Vincent's Orphan Asylum and St. Joseph's Orphan Asylum are not sectarian although owned and operated by Orders of the Roman Catholic Church); *Estate of Susan Evelyn Murray,* Adm. No. 29831 (D.C. Supreme Ct. Dec. 26, 1924) (Little Sisters of the Poor, A Roman Catholic Order); *In Re*: *Estate of Mariette Little,* Adm. No. 34,929 (D.C. Supreme Ct. Nov. 13, 1928) (Board of Relief of the Presbyterian Church); *In Re*: *Estate of Henry Kroger,* Adm. No. 1901-67 (D.D.C. May 6, 1968) (Salvation Army); Bequest Invalid, *see McInerney* v. *District of Columbia,* 122 U.S. App. D.C. 413, 355 F.2d 838 (1965) (Society of Perpetual Adoration); *see also Long* v. *Gloyd,* 25 W.L.Rptr. 50 (S.Ct. 1897) (bequest to priest as an individual and not as a priest as such is valid).

In view of the Court Reform Act and this Court's longstanding reluctance to review the interpretation of local law by D.C. courts, this Court should give due deference to the interpretation and construction of the

District of Columbia Mortmain Law over the years by the courts as enunciated in the decision below, since the manifest intent of Congress is that the new Article I courts in the District are to be analogous to state courts. Indeed, this court has so stated. *Pernell* v. *Southall Realty,* 416 U.S. 363, 94 S.Ct. 1723 (1974), *accord* as to Article III courts, *Del Vecchio* v. *Bowers,* 296 U.S. 280, 56 S.Ct. 190 (1935).

B

THE LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA MORTMAIN STATUTE

The D.C. Mortmain statute has its origin in the 34th section of the Maryland Declaration of Rights, adopted in 1776 which provides:

> "That every gift, sale, or devise of lands, to any minister, public teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in truth for, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use, or benefit; as also every devise of goods or chattels to, or to or for the support, use or benefit of, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination, without the leave of the legislature, shall be void; except always any sale, gift, lease, or devise, of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be improved, enjoyed or used, only for such purpose, or such sale, gift, lease or devise, shall be void." (Line 5, word 4, read trust)

Contrary to first appearances, the purpose of the 34th section of the Maryland Declaration of Rights of 1776 was not anti-religious, but rather an attempt to extend the protection of the state to all religious groups and not merely to the previously established church as explained by Dr. Hanley.

> "What did the state do for the denominations specifically, besides granting special recognition of Christianity and its influence? The direct action of the old regime was exclusively toward the established church. The provincial government gave property to the parishes, both in land and buildings. Glebe-land, as a benefice to a clergyman, and taxes yielded a constant income to the parish, its rector and curates. Only clergy of the Establishment claimed salaries and aid from the province. What impact did the Revolution have on these arrangements? Examination of the constitution and other legal provisions will reveal striking changes, which were unavoidably involved in politics, touching other religious groups as well as the succession of the formerly Established Church. The constitutional convention acted to safeguard the legal status of property held by all denominations. This was essential to them. "As they were all treated equitably," Duke observed, "and every party left in possession of what was properly its own, there were no complaints made." This was surely an accurate commentary on Article 34 of the Declaration of Rights.
>
> "This article gave assurance not only of title to property, but to its use and transmission, so essential to any growing religious congregation. The state undertook to make good by legal force any of these matters submitted to it for sanction. The "gift, sale, or devise of land," which were intended as benefits to ministers or similar persons, denominations or religious orders, were honored. These

> benefits were, under such legal conditions, valid, "in succession, or . . . after . . . death . . . and also . . . for the support, use or benefit of any minister, public teacher or preacher of the gospel, as such, or any religious sect, order or denomination . . ." This legislation gave the government some control in return for such legal benefits. Proposals for incorporation and other arrangements possible by Article 34 had to be approved by the assembly. St. Paul's Parish, for example, was strictly held to a stipulated formula for distributing its annual rents. The assumption was, however, that revision of the conditions of incorporation was possible by a new petition of the assembly. The rights of church petitioners were so exact and detailed that it would seem the assembly could not but concur in any provisions for incorporation." Thomas O'Brien Hanley, *The American Revolution & Religion,* 60, 61 (1971).

The Maryland Declaration of Rights, including paragraph 34, was made applicable to the District of Columbia by the Organic Act of 1801, 2 Stat. 103, ch. 15, sec. 2. In 1866 Congress repealed its adoption of the 34th section of the Maryland Declaration of Rights, but added a proviso to its repeal which is the predecessor to the present D.C. Code provision. The Repeal Act provides as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the thirty-fourth section of the Declaration [of] Rights of the State of Maryland, adopted seventeen hundred and seventy-six, so far as the same has been recognized and adopted in the District of Columbia, be, and the same is hereby, repealed and annulled, and that all sales, gifts, and devises prohibited by the said section, or by any law passed in accordance therewith,

> shall be, when hereafter made, valid and effectual: Provided, That, in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." 14 Stat. 232, ch. CCXXXVII (July 25, 1866).

The 1866 repeal and proviso was originally introduced as House Bill #564 merely to repeal the 34th section of the Declaration of Rights so that a citizen of the District of Columbia could make a gift of 10 to 12 thousand dollars for the purpose of building a Presbyterian church. CONG. GLOBE, 39th Cong., 1st Sess. 2676, 2677, 3970 (1866). When the bill came to the Senate, Senator Johnson noted that if section 34 were repealed ". . . there will be no limit here within the District, and they may hold any amount of real property." CONG. GLOBE, 39th Cong., 1st Sess. 2912 (1866). While Senator Willey saw no need for an interdiction upon the amount of property real or personal which a religious association could hold, Senators Davis, Johnson and Buckalew did. CONG. GLOBE, 39th Cong., 1st Sess. 3970 (1866). The question was then whether the limitation should be on the amount of the gift, as proposed by Senator Davis, or on the timing of the gift, as suggested by Senator Buckalew and introduced by Senator Johnson. CONG. GLOBE, 39th Cong. 1st Sess. 3970-3971 (1866). Senator Davis referred to the size restriction on gifts in his state as being applicable to any religious association or organization of any kind. He alluded to the supposed fact that in Mexico half the lands of the country were held by the church.[6] CONG.

[6] Cf. "In times of popery, said Lord Hardwicke, the clergy got nearly half the real property of the kingdom into their hands, and he wondered they had not got the whole," 4 Kents Com. 494 (1830).

GLOBE, 39th Cong., 1st Sess. 3971 (1866). Senator Johnson thought this was not to be feared in the United States because,

> "It is impossible with our institutions we can be in any danger from religious establishments: first, because there is no State religion; secondly, because there are so many different sects, each one of whom watches the others just as vigilantly as England would watch the dispositions of France. I do not see, therefore, that there is any great danger to result from leaving parties here to leave as much property to charities as they please." CONG. GLOBE, 39th Cong., 1st Sess. 3971 (1866).

Senator Buckalew, in speaking of the Pennsylvania [7] experience concerning the reasons for the time limitation on a bequest, stated:

> "Persons in the last hours of an expiring existence are subjected to influence of a very unusual character, and are subjected to them at a time when they are little able to exercise the full and mature powers of their minds." CONG. GLOBE, 39th Cong., 1st Sess. 3970 (1866).

Senator Johnson agreed with Senator Buckalew, remarking:

[7] The Pennsylvania statute to which the senator referred was adopted in 1855 and quoted in *Jones* v. *Habersham*, 107 U.S. 174, 78, 2 S.Ct. 336, 340 (1883). Its successor was found violative of the Constitution's equal protection clause by the Supreme Court of Pennsylvania in *In Re: Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (Pa. 1974) and *In Re: Estate of Riley*, 459 Pa. 428, 329 A.2d 511 (Pa. 1974) *cert. denied*, 421 U.S. 971, 95 S.Ct. 1966 (1975) with statement "The petition for a writ of certiorari is denied it appearing that the judgment below rests upon adequate state grounds." *See* case notes in 80 Dick.L.Rev. 152; 54 N.C.L.Rev. 341 and 37 U.Pitt.L.Rev. 169.

> "I very readily recognize the force of the observations made by my friend from Pennsylvania [Mr. Buckalew] It is very desirable that devises and gifts to objects of that description should be executed some reasonable time antecedent to the death of the donor or testator." CONG. GLOBE, 39th Cong., 1st Sess. 3970-3971 (1866).

From the foregoing it can be seen that Congress was concerned neither with the amount of property which might eventually be held by the church nor with the potential plight of the disinherited children [8] but rather was desirous of protecting a testator from overreaching by the clergy at a time when the testator was presumably least able to evaluate objectively a promise of salvation.

In the general revision of District of Columbia statutes in 1901 Congress removed the proscription of the Mortmain statute on intervivos gifts, 31 Stat. 1434 (1901), and in 1965 added the proscription of bequests and devises to a priest and rabbi for the purpose of clarification and completeness, also changing the phrase "calendar month" to "30 days." 79 Stat. 688 (1965).[9]

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[8] As noted by the Court below, the provisions of the District of Columbia Mortmain statute "operate regardless of whether the Testator has any family at all. In the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia." (Jurisdictional Statement, Appendix A, 8a.)

[9] The change from "calendar month" to "30 days" was based on West's Ann. California Probate Code § 41. The revision note is contained in 10 D.C. Code Encyclopedia 52. The California statute, however, was repealed. Stats. 1971 c. 1395 p. 4747, § 1.

C

THE ENGLISH BACKGROUND OF MORTMAIN

The Pennsylvania statute of 1855, Pa. Act April 26, 1855 P.L. 328 No. 347 (which applied to charitable rather than only religious transfers) after which the Congress modeled the 1866 proviso to its repeal of the 34th section of the Maryland Declaration of Rights, is based upon the Mortmain Act of 1736, 9 Geo. II c.36 [10] by which all charitable devises of land, or personalty to be laid out in the purchase of land, are rendered void unless made at least 12 calendar months before the death of the donor by a writing signed in the presence of two witnesses. Blackstone states that the statute was adopted because it was experienced

> ". . . that persons on their death-beds might make large and improvident dispositions even for these good purposes [charity] and defeat the political ends of the statutes of mortmain . . ." 2 Bl. Comm. 273.

The legislative history and interpretation of the 1736 act indicates that it was not patterned after the original Mortmain provision, *Magna Carta* c.36 (1217 and 1225) despite its reliance thereon. The traditional statutes (*Magna Carta*, De Viris Religiosis, 7 Edw. I, stat. 2, c.3 [1279], 15 Richard II c.5 [1391-2] and 23 Henry VIII c.10 [1531-2])

> ". . . though enacted to meet the evil of land falling into the dead hand, were designed to protect the

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[10] This statute was never applicable in the United States except in Pennsylvania and hence is not a part of American common law. 2 Kents. Comm. 282 (1830); *Perin* v. *Carey*, 24 How. 465, 507, 16 L.Ed. 701, 712 (1861); Remick "Restrictions on Gifts For Religious or Charitable Uses," 51 Dick. L.Rev. 201 (1947).

feudal rights of mesne lords rather than to nurture the selfish aspirations of the heirs-at-law." Gareth Jones, *History of The Law of Charity 1532-1827,* 112 (1969), *see also Fleta* III c.5 (89 Selden Society 9 [1972]); "Restrictions on Charitable Testamentary Gifts" 5 Real Property Probate & Trust J. 290 (1970).

The 1736 statute, in contrast, vested the devised real estate in the testator's heirs.

> "This statute was inspired by a fear and hatred of the Church and ecclesiastical charities, by a contempt for the 'vainglorious' ambitions of charitably minded testators and by a desire to ensure that the heir-at-law should enjoy 'some sort of natural right to succeed after his [ancestor's] death, at least to his [ancestor's] land-estate." Jones, *supra* 107, relying on William Cobbett *Parliamentary History of England,* IX, 1126 (1811).

The 1736 statute, nevertheless, did not single out religion, but applied to all charitable devises. In this regard the 1736 statute was not at odds with an ancient restriction on deathbed transfers of real estate to anyone. For example, Glanvill states:

> "Now, although the general rule is that any person is allowed to give freely in his lifetime a reasonable part of his land to whom he pleases, this liberty has not hitherto been extended to those about to die, because there might be an extravagant distribution of the inheritance if it were permitted to one who loses both memory and reason in the turmoil of his present suffering, a common enough happening. Therefore if anyone mortally sick began to distribute his land, which he had not in the least wished to do while he was well, this would be presumed to result rather from turmoil of the spirit than from deliberation of the mind. However, a gift of this kind made to another in a last will can hold good if made and confirmed with the heir's consent." Glanvill, *Tractatus de Legibus,* VII, 1 (Hall ed. 70 [1965]).

It should be noted, additionally, that the 1736 statute did not apply to bequests of pure personalty, because testaments of personal property (in the absence of spouse and children) had always been freely disposable; even where legitim applied to protect a spouse and children the testator was free to dispose of ⅓ of his estate, *see* Glanvill, *Tractatus de Legibus,* VII, 5 (Hall ed. 80 [1965]); recognized in *Magna Carta* c.26 (1215) and c.18 (1225) "And if he owes us nothing, all the chattels shall be accounted as the deceased's saving their reasonable shares to his wife and children;" stated in Bracton, *De Legibus Et Consuetudinibus Angliae,* F 61 (Thorne ed. II, 180 [1968]), "If he dies without wife or children, then the whole will remain at the deceased's disposal;" *accord Fleta,* II, c.57 (72 Selden Society 193 [1953]).

The original Mortmain prohibition applied to real estate to prevent the loss of feudal incidents. During the reformation Mortmain statutes were used to void the concept of the superstitious use "so-called because it was a use which supported false (superstitious) religious purposes" as distinguished from legitimate charitable uses, Jones, *supra* p. 11. In Georgian times Mortmain became the basis of voiding all charitable transfers of land made within a year of death. The prohibition thus evolved from disabling the grantee from receiving real estate to invalidating the grant of a short lived grantor. It was not until the time of the reformation and actually the Hanovarians that attention focused on the nature of the devise rather than on the

status of the devisee. At no time other than the reformation was there a conscious effort to single religious gifts out for treatment different than that afforded charities generally. During all this time no such restrictions applied to legacies of personalty. Appellee acknowledges that while this Court may not have heretofore seen a constitutional distinction between realty and personalty, *United States* v. *Burnison,* 339 U.S. 87, 93, 70 S.Ct. 503, 507 (1950), there is a decided historical and legal difference as above described which should be considered in evaluating the reasonableness of D.C. Code § 18-302, since constitutionality ". . . depends upon the character of the discrimination and its relation to legitimate legislative aims." *Mathews* v. *Lucas,* 427 U.S. 495, 504, 96 S.Ct. 2755, 2761 (1976).

Appellee submits that the foregoing analysis of the history of the District of Columbia Mortmain statute supports the assertion that the statute is unique in its restriction on religious bequests and devises, and that its purpose is to reach only those bequests and devises made to religious organizations for religious purposes. When the Congress adopted the proviso to its repeal of the 34th section of the Maryland Declaration of Rights, in an attempt to provide the District of Columbia with a "deathbed gifts" Mortmain statute, the Congress fully intended to restrict only religious gifts. By neglecting to include charitable gifts as well, the Congress adopted a unique statute which was not in conformity with the very precedent pursuant to which the Congress purported to act. For the reasons to be developed in this Brief Appellee submits this action by Congress is constitutionally infirm.

III

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE IRRATIONALLY DISCRIMINATES AGAINST RELIGIOUS BEQUESTS AND DEVISES

A

APPELLANTS HAVE FAILED TO SHOW ERROR

The Court below (Jurisdiction Statement, Appendix A, 7a, 8a) found that D.C. Code § 18-302

> ". . . voids only religious devises or bequests and distinguishes further between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions making only the latter valid. There is no rational basis for presuming that a testator troubled by religious considerations is likely to make a bequest directly to a church, rather than to a charity run by the church. Thus, the statute arbitrarily provides different treatment for similarly situated legatees."

Appellants' quarrel with the decision below is not that the court used the wrong equal protection formula [11] but that the court reached the wrong result. Appellants argue that the classification is rational because the influence of the church is greater (Appel-

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[11] The Court below used the "rational basis" test relying upon *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400 (1972); *Reed* v. *Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971); *Stanton* v. *Stanton,* 421 U.S. 7, 95 S.Ct. 1373 (1975) and *Eisenstadt* v. *Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972). While equal protection under the Fourteenth Amendment is not applicable because the District of Columbia is not a state (*District of Columbia* v. *Carter,* 409 U.S. 418, 93 S.Ct. 602 [1973]), "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" stated the District of Columbia Court of Appeals, citing *Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976) (Jurisdictional Statement, Appendix A, 6a).

lant's Brief, p. 11). Appellants, however, ignore the central holding of the court below that the discrimination is not between religious gifts and non-religious gifts but between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions (Jurisdictional Statement, Appendix A, 8a). Appellants therefore, by failing to address the actual holding of the Court below, have failed to demonstrate error.

B

THE CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION ARE APPLICABLE TO LAWS REGULATING TRANSMISSION OF PROPERTY AT DEATH

Appellants appear to suggest in their Brief, page 9, that constitutional requirements of equal protection are not applicable to laws regulating the transmission of property at death. Appellee submits that this novel proposition is incorrect.

Appellee nevertheless does not question here the proposition that governmental control over disposition of property at death through regulation of both testate and intestate succession is a proper function of government. Cf. *United States* v. *Burnison,* 339 U.S. 87, 70 S.Ct. 503 (1950); *Labine* v. *Vincent,* 401 U.S. 532, 91 S.Ct. 1017 (1971). Appellee, further, does not assert either a constitutional right on the part of the testatrix to execute a will or on its part to be a legatee thereunder, *Burnison, supra.* Although there is good reason [12] and historical authority [13] for that proposi-

[12] *E.g., Nunnemacher* v. *State,* 129 Wisc. 190, 108 N.W. 627, 9 L.R.A. (N.S.) 121 (1906).

[13] *E.g., Magna Carta,* c.26 (1215) and c.18 (1225); Pollock & Maitland, *History of English Law* II, 348 (1898); Holdsworth, *A History of English Law 4th ed.,* III, 550 (1942).

tion, such is not at issue in this case. However, the courts have recognized that when the government becomes involved with carrying out a will (*Evans* v. *Newton,* 382 U.S. 296, 86 S.Ct. 486 [1966]), selecting a fiduciary (*Reed* v. *Reed,* 404 U.S. 71, 92 S.Ct. 251 [1971]), or making dispositive choices upon intestacy (*Eskra* v. *Morton,* 524 F.2d 9 [7th Cir. 1975]) that its choices "are not immunized from equal protection scrutiny." *Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459, 1464 n.12 (1977). While for reasons which are advanced *infra,* Appellee believes there is a fundamental interest, namely religion, involved in this case so as to render the compelling governmental interest standard for equal protection review applicable, there is without cavil a right to be free of invidious discrimination founded upon no reasonable basis, *Weinberger* v. *Salfi,* 422 U.S. 749, 95 S.Ct. 2457 (1975). This right applies equally to both the testator and the beneficiary, although in the context of this case Appellee does not think it is either useful or necessary to break down the transaction into separate inquiries pertaining to each of the parties, as was done in *United States* v. *Burnison,* 339 U.S. 87, 70 S.Ct. 503 (1950) (power to will vs. power to receive) or *Califano* v. *Goldfarb,* —— U.S. ——, 97 S.Ct. 1021 (1977) (discrimination against wage-earner or survivor).

Appellee also does not dispute in this case the proposition that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction" as set forth in *Irving Trust Co.* v. *Day,* 314 U.S. 556, 62 S.Ct. 398 (1942) although that proposition was based upon poor historical analysis since it ignored the 700 year-old

right of a testator to bequeath at least one-third of his property to whomever he chooses, as was recognized in *Magna Carta* c.26 (1215) and c.18 (1225). Nevetheless, when the government makes a benefit available it must do so consistently with the requirements of equal protection.

Thus, Appellee does not argue that the imposition of a period of survivorship after execution of a will is an unconstitutional condition for the validity of a will [14] but rather that D.C. Code § 18-302 imposes such a condition discriminatorily. It would be one matter to impose the condition of the testator's survivorship for thirty days for the validity of all bequests and devises as inferentially suggested by Glanvill, VII, 1, *supra*. Arguably, such a condition might be imposed upon bequests and devises to charity generally, and although that proposition is not free of doubt,[15] it at least has a

[14] Appellants argue that D.C. Code § 18-302 "is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid" (Appellants' Brief, p. 9). Contrary to Appellants' contention, D.C. Code § 18-302 is not merely a statute governing the formal requirements for a testament. It cannot be because historically there were no formal statutory requirements for testaments of personal property in the District of Columbia until 1901. See 31 Stat. 1433 ch. 59 (1901). Before 1901 testaments of personal property were not required to be in writing or witnessed, whereas wills of real property have had to be in writing (since 32 Henry VIII c. 1 [1540]) and witnessed by attesting witnesses (since 29 Car. II c. 3 xii [1677]), a legacy to whom was void (since 25 Geo. II, ch. 6, sec. 1-7 [1752]). Thus, neither D.C. Code § 18-302 nor the Mortmain Act of 1736, 9 Geo. II c. 36, added any formalities to the requirements for the execution of testaments.

[15] Thirty day donor survivorship for charitable gifts denies charities equal protection, *In Re: Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (Pa. 1974); *In Re: Estate of Riley*, 459 Pa. 428, 329 A.2d 511 (Pa. 1974) *cert. denied*, 421 U.S. 971, 95 S.Ct. 1966 (1975) *contra*,

validity being historically consistent with the Mortmain Act of 1736. 9 Geo. II c.36. Appellee submits, however, that if the condition of survivorship is imposed only when the bequest or devise is to a religious organization for religious purposes, an invalid act of discriminatory classification results.

In view of the operation of D.C. Code § 18-302 which voids gifts which fall within its proscription (*Long* v. *Gloyd*, 25 Wash.L.Rptr. 50 [S.Ct. 1897], gift is void not voidable), there is no question that the government is involved in the disposition of a decedent's property when such a bequest is voided, because the law then determines who is to receive the property.[16] Appellants' assumption, unsupported by federal authority, that equal protection does not apply to the issues in this case is accordingly without merit.

C

THE CLASSIFICATION CREATED BY D.C. CODE § 18-302 IS BASED ON CRITERIA WHICH BEAR NO RATIONAL RELATION TO A LEGITIMATE LEGISLATIVE GOAL

As seen above, the District of Columbia Mortmain statute, D.C. Code § 18-302, is unique both from the point of view of history and contemporary American

Taylor v. *Payne*, 154 Fla. 359, 17 So.2d 615, *appeal dismissed*, 323 U.S. 666, 65 S.Ct. 49 (1944); *Decker* v. *American Univ.*, 236 Iowa 895, 20 N.W.2d 466 (1945).

[16] Under District of Columbia law when part of a gift of the residue, as is the bequest to Appellee, fails (lapses) the property passes as intestate property. *In Re: Estate of Prentice*, 104 Daily Wash.L.Rptr. 1525 (Adm. No. 945-75, S.Ct. July 21, 1976). As the Court said in *Trimble* v. *Gordon*, —— U.S. ——, 97 S.Ct. 1459 (1977) note 16 at p. 1467, "The term "statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not individuals. Under the Fourteenth Amendment this is a fundamental difference."

law in that it treats gifts to religious institutions for religious purposes differently from all other testamentary gifts. Appellee submits that the statute is irrational and bears no reasonable relation to a legitimate governmental goal, because there is no reasonable basis for the discrimination imposed by D.C. Code § 18-302.

1

The Classification Of The Statute Which Voids Some But Not All Testamentary Gifts To Religious Organizations Is Not Reasonably Related To The Legislative Goal Of Protecting The Testator From Undue Religious Influence

The District of Columbia Court of Appeals found that

> "The purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations." (Jurisdictional Statement, Appendix A, 3a.)

The court relied upon the legislative history cited above. The court was careful, however, to distinguish the history and purpose of the District of Columbia Mortmain statute from that of the usual Mortmain statute. Thus, the court did not find that the District's Mortmain statute was designed to protect the testator's family because such an expression is not contained in the legislative history, although it noted that

> "Mortmain statutes in general are intended to protect a donor's family from disinheritance due to charitable gifts made either without proper deliberation or as a result of undue influence on the part of the beneficiaries." (Jurisdictional Statement, Appendix A, 3a, 4a.)

Appellants, choosing to ignore the legislative history of the statute, cite at page 9 of their Brief the protection of the testator's lawful heirs as a purpose of the District of Columbia Mortmain statute. The case from which Appellants' source is derived, *In Re: Nutting's Estate,* 82 F.Supp. 689 (D.D.C. 1949) *aff'd sub nom., Linkins* v. *Protestant Episcopal Cathedral Foundation of The District of Columbia,* 87 U.S. App.D.C. 351, 187 F.2d 357 (1950) does not state the purpose of the District of Columbia statute; rather the court notes, at page 690, that the statute

> ". . . is similar in purport to statutes in many states. It is generally held that such statutes are to be strictly construed. The purpose of such statutes has been variously stated; to prevent improvident testamentary gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or as sometimes stated, it is intended to prevent a testator, under the fears incident to death, from disposing of his estate to the prejudice of his descendants."

In any event, as noted by the Court below, D.C. Code § 18-302 operates without regard to whether the testator has heirs or not and "in the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia." (Jurisdictional Statement, Appendix A, 8a.) It should also be noted that were the purpose of D.C. Code § 18-302 to protect the heirs, that the heirs are not permitted by the statute to waive that protection in favor of the religious legatee, a provision suggested by Glanvill in *Tractatus de Legibus,* VII, 1, quoted *supra,* and often contained in Mortmain statutes, *see Taylor* v. *Payne,* 154 Fla. 359, 17 So.2d 615, *appeal dismissed,* 232 U.S. 666, 65 S.Ct. 49 (1944).

The family of a decedent is specifically protected by D.C. Code § 19-101 which both defines the family and provides for an allowance. Collateral heirs at law and next of kin such as Appellants are not included within D.C. Code § 19-101, nor are they protected by six out of seven jurisdictions with Mortmain statutes.[17] We think D.C. Code § 18-302 can hardly be said to mirror any presumed intent of the testator to benefit statutory heirs at law and next of kind as substituted beneficiaries in the event of interdiction of a bequest, because such was not found to be a statutory purpose by the District of Columbia Court of Appeals. *See Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459 (1977).

Thus, D.C. Code § 18-302 was not enacted by Congress to protect a decedent's family. Those other Mortmain statutes which were adopted to protect the family do not operate for the benefit of collateral heirs at law and next of kin, such as Appellants. *See Jones* v. *Habersham,* 107 U.S. 174, 2 S.Ct. 336 (1883) (Georgia Code does not invalidate charitable devise contained in will executed within 90 days of death in absence of spouse, child or descendant of child). D.C. Code § 18-302 operates without regard to whether the testator is survived by any kin whatsoever. The statute, therefore,

[17] The statutes of Florida, Georgia, Idaho, Iowa, Mississippi, Ohio and New York protect a combination of spouse, child or descendants. The Montana statute like D.C. Code § 18-302 applies regardless of who survives the testator. Fla. Stat. Ann. § 731.19 (1964); Ga. Code Ann. § 113-107 (1935); Idaho Code § 15-2-615 (Supp. 1972); Iowa Code Ann. § 633.266 (1964); Miss. Code Ann. § 91-5-31 (1972); Mont. Rev. Codes Ann. § 91-142 (1947); N.Y. Est., Powers & Trusts § 5-3.3 (McKinney 1967); Ohio Rev. Code Ann. § 2107.06 (Page 1954). None of these statutes, however, is restricted to only religious bequests and devises. For a general discussion of the statutes, see "Restrictions On Charitable Testamentary Gifts," 5 Real Property, Probate & Trust J. 290 (1970).

is not related to the achievement of protection for the heirs at law and next of kin, even if it could be said that was the purpose of the statute.

By the statute's entire failure to include charitable bequests, even charitable bequests to religious organizations, so that the heirs at law and next of kin may be "disinherited" by a gift to charity, the statutory classification bears no rational relationship to a legitimate governmental purpose, that of protecting the family, assuming that was the legitimate purpose. Neither does the statute bear any reasonable relation to the goal of protecting a testator from undue religious influence, assuming such could be a legitimate legislative purpose, since D.C. Code § 18-302 does not reach charitable gifts to religious organizations. The statute, thus, is not carefully tuned to alternative considerations as required by equal protection, *see Matthews* v. *Lucas,* 427 U.S. 495, 96 S.Ct. 2755 (1976) and *Trimble* v. *Gordon,* —— U.S. ——, 97 S.Ct. 1459 (1977), *see also,* Remick, "Restrictions on Gifts For Religious or Charitable Uses," 51 Dick.L.Rev. 201 (1947).

2

The Classification Was Not Created For A Legitimate Legislative Goal

The express Congressional purpose for D.C. Code § 18-302 as found by the court below (Jurisdictional Statement, Appendix A, 3a) "is to preclude 'deathbed' gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations." Appellants rely upon the argument that because the influence of the clergy is greater, it is rea-

sonable for the government to act "to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation" (Appellant's Brief, p. 13). Appellee submits that the legislative goal of D.C. Code § 18-302 is not legitimate, since it is an attempt, by including only religious gifts to religious organizations, to deprive the clergy and religious organizations of the privilege of receiving bequests that anyone else may receive. In *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 93 S.Ct. 2821 (1973), a case involving the question of whether food stamp rules were discriminatory, the Court found that the legislative history indicated a Congressional purpose to prevent "hippies" from receiving food stamps. The Court stated at page 534/2826

> "The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politcally unpopular group cannot constitute a *legitimate* governmental interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.' 345 F.Supp. at 314 n. 11."

Even without a reference to the First Amendment free exercise clause as a guarantee of the right of the clergy and religious organizations to solicit gifts, which is discussed *infra,* it would seem in light of the history of Mortmain, a Congressional singling out of religious persons and organizations for discriminatory treatment cannot constitute a legitimate legislative goal." Since both the Pennsylvania statute (from which D.C. Code § 18-302, was taken), the English statute (from which the Pennsylvania statute was taken), as well as the other remaining American Mortmain statutes include charities generally within their proscription and not just religion, what legitimate legislative purpose did Congress have in adopting D.C. Code § 18-302 by which religion alone is subjected to discriminatory treatment? Since the arguable legitimate goal of all the Mortmain statutes is to protect the family from disinheritance why did Congress offer that protection only for disinheritance through religious bequest without even regard to whether the testator is survived by a family or heirs at-law and next of kin?

Appellee submits that the decision of the District of Columbia Court of Appeals was correct that D.C. Code § 18-302 creates a discriminatory classification for which there is no reasonable or rational basis and therefore the decision should be affirmed.

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[18] Appellee also sugegsts that the establishment clause mandates this conclusion, *see Everson* v. *Board of Education of Ewing Tp.* 330 U.S. 1, 18, 67 S.Ct. 504, 513 (1947) "State power is no more to be used so as to handicap religions, than it is to favor them;" *School District of Abington Tp. Pa.* v. *Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571 (1963) "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson* v. *Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270 (1968) Government ". . . may not be hostile to any religion. . . ."

IV

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE UNCONSTITUTIONALLY AFFECTS A FUNDAMENTAL INTEREST BY ITS CLASSIFICATION OF TESTAMENTARY RELIGIOUS GIFTS TO RELIGIOUS ORGANIZATIONS FOR WHICH NO COMPELLING INTEREST HAS BEEN SHOWN

A

AS THE STATUTE AFFECTS RELIGIOUS GIFTS IT AFFECTS A FUNDAMENTAL INTEREST

The District of Columbia Court of Appeals determined

> ". . . that the discriminatory treatment cannot stand even under the rational basis test,

thus, it decided,

> "it is unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest,"

even though,

> "The trial court determined that there is neither a compelling state interest nor rational grounds justifying the statutory classification." (Jurisdictional Statement, Appendix A, 9a)

Appellants have asserted that since the District of Columbia Mortmain statute has a secular purpose and deals with a secular activity it cannot be found to regulate a fundamental interest (Appellants' Brief pp. 7, 10). Appellants also argue that the statute does not affect a suspect class (Appellants' Brief, p. 12). The trial court, however, in an opinion by Judge Newman

(now Chief Judge of the District of Columbia Court of Appeals), determined that the District of Columbia Mortmain statute affects only religious bequests, and religious interests "have traditionally been regarded as in a preferred position under our Constitution." The trial court then concluded that "The regulation of such conduct or actions, however, can only be justified by a showing of a compelling state interest." (Jurisdictional Statement, Appendix B, 6b, 7b).

1

A Statute Which Interdicts Only Testamentary Religious Gifts To Religious Organizations Is Not Legislation Having A Secular Purpose And Dealing With A Secular Activity

As noted above, the District of Columbia Mortmain statute only affects testamentary religious gifts to religious organizations. It does not void charitable gifts to organizations owned and operated by religious institutions. Appellants, by focusing their analysis on the testamentary disposition of property, which they call a secular activity, fail to perceive that the restriction on only religious gifts, on the grounds that only the clergy have such a beguiling power to effect bequests and devises due to their patent on the salvation of the soul (Appellants' Brief, pp. 7, 11), injects religion into what might otherwise be a secular activity.[19] A statutory purpose to invalidate a gift to religion on the presumed grounds that it has been solicited by the clergy until the testator has had a "cooling off" period can

[19] In view of the early history of wills, the language of wills, the religious horror of intestacy and the role of the church and its courts in enforcing wills, Appellants' characterization of a bequest or devise to a church as a secular act can only be characterized as historically curious. See Pollock and Maitland, *History of English Law*, II 314-363 (1898).

hardly be found to be secular. If the statute was directed to only a secular activity for a secular purpose, it would not single out religion; it would deal with all bequests and devises to all charitable institutions as indeed the original modern Mortmain statute did 9 Geo. II c.36 (1736). Because the District of Columbia Mortmain statute singles out religion on the tenuous ground that the church has more sway with the soon-to-die, the statute reflects the legislative stereotype assumption that a testator is more likely to be moved by the persuasion of the church, in other words, to act on the basis of religious appeal.

2

A Statute Which Classifies An Activity Because Undertaken For Religious Reason Affects A Fundamental Interest

The trial court had no difficulty understanding that because the District of Columbia Mortmain statute classifies religious bequests and devises and differently, it affects a fundamental interest (Jurisdictional Statement, Appendix B, 6b), because it is a regulation of acts prompted or undertaken on account of religious consideration. *Sherbert* v. *Verner,* 374 U.S. 398, 83 S. Ct. 1790 (1963). It should be noted that the District of Columbia Mortmain statute is entirely different from the Sunday closing laws, the specious analogy to which is so heavily relied upon by Appellants (Appellants' Brief, p. 7). As has been shown, the Mortmain statute applies only to religious bequests and devises whereas the Sunday closing laws applied either to all business or classified business on the basis of goods sold. *Braunfeld* v. *Brown,* 366 U.S. 599, 81 S.Ct. 1144 (1961). A statute which does not single out religion may well have a secular purpose and be justifiable even if a burden is

imposed thereby on religion ". . . unless the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld* v. *Brown, supra,* p. 607/1148.[20]

B

THERE IS NO COMPELLING GOVERNMENTAL NEED FOR THE DISTRICT OF COLUMBIA MORTMAIN STATUTE

Since the District of Columbia Mortmain statute affects a fundamental interest it may survive equal protection analysis only if Appellants can show a compelling governmental need for it. *Sherbert* v. *Verner, supra.* Appellants failed to make that showing in the trial court, in the District of Columbia Court of Appeals, and have failed so to do in their Brief before this Court.

The trial court found there was no compelling interest "since alternative less restrictive methods of preventing abuse are available." (Jurisdictional Statement, Appendix B, 7b.) The trial court further stated "there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period" (Jurisdictional Statement, Appendix B, 7b).[21]

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[20] The Florida Mortmain statute applied to all charities. Presumably this was the basis for this Court's dismissal of the appeal for want of a substantial federal question in *Taylor* v. *Payne,* 154 Fla. 359, 17 So.2d 615, *appeal dismissed,* 323 U.S. 666, 65 S.Ct. 49 (1944).

[21] In Appellee's view such a presumption would still be treating religion differently but it would have the merit of at least avoiding a total forfeiture. The legacies in this case would have been valid under such a rule inasmuch as it was stipulated that none knew of any undue influence (A. 14). The District of Columbia Court of

Thus, Appellee submits that those reasons advanced above as to the irrationality of the District of Columbia Mortmain statute apply equally to show why there is no compelling governmental need for the statute. Additionally, Appellee submits that there is no legitimate need for government regulation of testamentary religious gifts since the existing remedy for invalidating bequests or devises secured through undue influence is sufficient.[22]

Appellee, therefore, submits that the decision of the District of Columbia Court of Appeals may be found correct on the alternative ground that D.C. Code § 18-302, by singling out religious bequests and devises for discriminatory treatment, affects a fundamental interest in religion, for which there is no compelling governmental need in view of both the long standing freedom of testamentary disposition of personal property and the less restrictive means available for preventing undue influence in the execution of wills.

Appeals noted that D.C. Code § 18-302 "Establishes an irrebuttable presumption that certain bequests to clergymen or religious organizations are the result of undue influence" and because many others who are in an equal position to influence a testator do not suffer forfeiture of their legacies, the statute is irrational because "There is no ground of difference that rationally explains the different treatment accorded religious entities." (Jurisdictional Statement, Appendix A., 8a.) Appellee agrees with this analysis, however, Appellee believes that because there is a fundamental interest in religion involved in this case that even a rebuttable presumption or imposition of a burden of proof upon religion would be impermissible, cf. *Frontiero* v. *Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). Appellee also agrees with the Court's statement of its function in reviewing a "presumption" case, "Nor, in ratifying these statutory classifications, is our role to hypothesize independently on the desirability or feasibility of any possible alternative basis for presumption." *Mathews* v. *Lucas,* 427 U.S. 506, 96 S.Ct. 2755, 2767 (1976).

[22] For a discussion of the existing remedy, see Mersch, *Probate Court Practice In The District of Columbia* (2nd ed.) § 741 *et seq.* (1939).

V

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE UNCONSTITUTIONALLY RESTRAINS THE FREE EXERCISE OF RELIGION

While the District of Columbia Court of Appeals did not invalidate the District of Columbia Mortmain statute on First Amendment grounds, a concurring opinion thought that court should have done so. (Jurisdictional Statement, Appendix A, 9a-11a.) The trial court, however, did base its holding of unconstitutionality in part on the First Amendment. (Jurisdictional Statement, Appendix B, 6b.)

Appellants assert that the operation of the District of Columbia Mortmain statute which invalidates only testamentary religious gifts does not restrain the free exercise of religion. Appellants also question whether Appellee is entitled to the free exercise of religion. Appellee submits both these points are groundless.

A

THE DISTRICT OF COLUMBIA MORTMAIN STATUTE RESTRAINS THE FREE EXERCISE OF RELIGION

As Appellee has shown *supra,* the District of Columbia Mortmain statute applies only to testamentary gifts to religious institutions. The statute discriminates against religious gifts because presumably they have been procured through religious zeal, as opposed to non-religious ordinary undue influence.

Appellee concedes that as to matters of conduct the First Amendment does not impose an absolute bar to

statutory regulation when "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert* v. *Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 1793 (1963). Appellee submits, however, that when only those actions presumably inspired by religion are regulated that religion itself is regulated. This statute singles out religion; "Clearly the statute discriminates against religion." *In Re: Small,* —— F.Supp. ——, 100 Daily Wash. L.Rptr. 453 (Adm. No. 2507-70 D.D.C. 1972).

B

APPELLEE IS ENTITLED TO THE FREE EXERCISE OF RELIGION

Appellants have shockingly suggested that Appellee is not entitled to the free exercise of religion. (Appellants' Brief p. 8.) Appellee submits that it most certainly is entitled to the free exercise of religion which the District of Columbia Mortmain statute has restrained.

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church In North America,* 344 U.S. 94, 116, 73 S.Ct. 143, 154-155 (1952) the free exercise of religion as a right was afforded to the church, although in circumstances quite different from this case. That case relied in part upon *Watson* v. *Jones,* 13 Wall. 679, 20 L.Ed 666 (1872) wherein the Court noted at page 723/674:

> "... it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, providing that in doing so they violate no law of morality,

> and give to the instrument by which their purpose is evidenced, the formalities which the laws require."

Thus, free exercise contemplates the acquisition of property. This right has inferentially been recognized by the Court, which remarked in *Jones* v. *City of Opelika*, 316 U.S. 584, 62 S.Ct. 1231 (1942), at page 596/1239,

> "Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge."

The Court has also noted in *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870 (1943) at page 111/874,

> "It is plain that a religious organization needs funds to remain a going concern."

Were the District of Columbia to adopt a "cooling off" law permitting a donor to rescind a gift made to a door to door religious preacher, Appellee has no doubt this Court would not uphold it. Cf. *Schneider* v. *State of New Jersey,* 308 U.S. 147, 60 S.Ct. 146 (1939) (invalidity of handbilling regulation); *Jamison* v. *State of Texas,* 318 U.S. 413, 63 S.Ct. 669 (1943) (invalidity of handbilling regulation used to prevent religious solicitations);[23] *Busey* v. *District of Columbia,* 78 U.S. App.D.C. 189, 138 F.2d 592 (1943) (license fees may be invalid regulation of religious pedlers). Certainly the

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[23] The Court also stated "In *Cantwell* v. *Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352, we said that a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or *delaying their collection.*" (Emphasis supplied.) *Jamison, supra* p. 417/672.

District of Columbia Mortmain statute which is intended to regulate the solicitation of religious testamentary gifts by voiding delivery after death if the intent to give is expressed in a will executed within 30 days of death is no less invalid. Appellee submits that if a testator must survive 30 days in order for a testamentary gift to religion to be valid upon probate there is a "chilling effect" upon the testator's exercise of his freedom of religion. This Court has recently stated that a contribution to a political group is protected by the First Amendment as it stated in *Abood* v. *Detroit Board of Education,* ——U.S. ——, —— S.Ct. ——, 45 U.S. L.W. 4473, 4480 (No. 75-1153 May 23, 1977)

> "One of the principles underlying the Court's decision in *Buckley* v. *Valeo,* 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," *id.,* at 22, the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests," *id.,* at 23."

If a contribution to a political party (which is nowhere specifically mentioned in the Constitution) is protected by the First Amendment, certainly a testamentary religious gift to a religion (which is specifically given a preferred position by the Constitution) perforce must be protected.

Appellee submits that the decision of the District of Columbia Court of Appeals may be affirmed on the alternative ground advanced in the concurring opinion below that D.C. Code § 18-302 is an unconstitutional

infringement on the free exercise of religion. By voiding a testamentary gift to religion on the assumed grounds that the gift was procurred by undue religious influence, the statute restricts both the testator's free exercise right to make the bequest or devise and the clergy and a religious institution's free exercise right to solicit the same. Since D.C. Code § 18-302 is only directed toward testamentary religious gifts it places an unconstitutional burden on the free exercise of religion since there is a less restrictive remedy for any actually demonstrable undue influence.

CONCLUSION

Appellee, St. Matthews Cathedral, therefore, submits that this Court does not have appeal jurisdiction in this case and that as the issues do not present a substantial federal question this Court not review the case under certiorari jurisdiction. The Court should accordingly dismiss the appeal.

If the Court reviews the case either by appeal or certiorari, Appellee prays that the Court affirm the judgment of the District of Columbia Court of Appeals.

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APPENDIX

CONSTITUTIONAL AND STATUTORY APPENDIX

Constitution of the United States Article I, Section 8, Clause 17. The Congress shall have power

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And"

Article III, Section 1

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Amendment 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 1257, State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. As amended July 29, 1970, Pub.L. 91-358, Title I, § 172(a)(1), 84 Stat. 590."

D.C. Code § 18-302. Devises or bequests for religious purposes

"A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. (Sept. 14, 1965, 79 Stat. 688, Pub.L. 89-183, § 1, eff. Jan. 1, 1966.)"